UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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LENNY MOLINA,

Plaintiff,

v. 20 CV 10821 (GHW)

HORNBLOWER GROUP, INC.; HORNBLOWER NEW YORK, LLC; and HORNBLOWER CRUISES AND EVENTS, LLC,

Defendants. Decision (via Telephone)

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New York, N.Y.
September 22, 2022
12:30 p.m.

Before:

HON. GREGORY H. WOODS,

District Judge

APPEARANCES

SHALOM LAW, PLLC
Attorneys for Plaintiff
BY: JONATHAN SHALOM

GORDON REES SCULLY MANSUKHANI LLP
Attorneys for Defendants
BY: RYAN E. DEMPSEY
MICHAEL J. SCHACHER

(Case called)

THE COURT: Let's begin. First, apologies for starting late. Thank you joining.

Let me begin by taking appearances from the parties. First, who is on the line for the plaintiff?

MR. SHALOM: This is plaintiff's counsel Jonathan Shalom for plaintiff, Lenny Molina.

THE COURT: Thank you very much.

Who is on the line for defendants?

MR. DEMPSEY: Ryan Dempsey, your Honor, with the law firm of Gordon Rees for the defendants.

MR. SCHACHER: Michael Schacher, your Honor, Gordon Rees, also for defendants. Good afternoon.

THE COURT: Thank you very much.

Let me begin with a few brief instructions about the rules I would like the parties to follow during this conference.

At the outset, please remember that this is a public proceeding. Any member of the public or press is welcome to dial into this call. I'm not currently monitoring whether third parties are auditing the conference. I ask you to just please keep that fact in mind.

Second, please place your phones on mute. I'm hearing a little bit of background noise. If you just place your phones on mute, that will deal with it. Thank you very much

for doing that.

Third, please state each name you speak. You should do that regardless of whether or not you have spoken previously.

Fourth, please abide by instructions from our court reporter that are designed to help the court reporter do their job.

Finally, I am ordering that there be no recording or rebroadcast of all or any portion of today's conference.

Counsel, with that out of the way, I scheduled this conference to take up defendants' motion for summary judgment. I reviewed the parties' submissions.

Is there anything that either of you would like to add with respect to your written submissions?

Let me begin with counsel for defendants.

MR. SCHACHER: I don't have anything to add, your Honor. My colleague, Mr. Dempsey, might, but I don't.

MR. DEMPSEY: No, your Honor. Nothing to add.

THE COURT: Thank you.

Counsel for plaintiff.

MR. SHALOM: Yes, your Honor. I have nothing to add.

THE COURT: Thank you very much.

I am going to rule on the motion orally. I am going to do that now. Please place your phones on mute as I describe the reasoning for my decision.

I am going to deny Defendants' motion for summary judgment. Fundamentally, there are disputed issues of fact that preclude the entry of summary judgment. I am going to grant Defendants' motion to exclude any expert testimony on Plaintiff's behalf because he has failed to comply with the scheduling order in this case without justification.

On December 29, 2021, Defendants filed a motion for summary judgment, seeking the dismissal of all of Plaintiff's claims. Dkt. No. 40. The motion also requested that the Court exclude any prospective expert testimony to be offered by Plaintiff. Plaintiff filed his opposition on February 4, 2022. Dkt. No. 44. In support of the opposition, Plaintiff submitted an affidavit (the "Molina Aff."). Dkt. No. 45. Plaintiff argued that dismissal of his claim was inappropriate due to disputed issues of material fact regarding whether he suffered from a disability and whether it, and his request for an accommodation as a result of it, had resulted in his termination. Plaintiff did not oppose Defendants' motion to exclude expert testimony. Defendants filed their reply on February 11, 2022. Dkt. No. 46.

The parties are familiar with the underlying facts. Therefore, I will not recite those in detail. To the extent that any of the facts presented in the parties' submissions are pertinent to my decision, those facts are embedded in my analysis.

II. SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("[S]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" (quoting former Fed. R. Civ. P. 56(c))). A genuine dispute exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," while a fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

The movant bears the initial burden of demonstrating "the absence of a genuine issue of material fact," and, if satisfied, the burden then shifts to the non-movant to present "evidence sufficient to satisfy every element of the claim." *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008) (citing *Celotex*, 477 U.S. at 323). To defeat a motion for summary judgment, the non-movant "must come forward with 'specific facts showing that there is a genuine issue for trial.'"

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting former Fed. R. Civ. P. 56(e)). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252. Moreover, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita*, 475 U.S. at 586 (citations omitted) and she "may not rely on conclusory allegations or unsubstantiated speculation," *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 428 (2d Cir. 2001) (internal quotation marks and citation omitted).

In determining whether there exists a genuine dispute as to a material fact, the Court is "required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." *Johnson*, 680 F.3d at 236 (internal quotation marks and citation omitted). The Court's job is not to "weigh the evidence or resolve issues of fact." *Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 254 (2d Cir. 2002) (citation omitted); *see also Hayes v. N.Y. City Dep't of Corr.*, 84 F.3d 614, 619 (2d Cir. 1996) ("In applying th[e] [summary judgment] standard, the court should not weigh evidence or assess the credibility of witnesses."). "Assessments of credibility and choices between conflicting versions of the events are matters for the jury,

not for the court on summary judgment." *Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005) (citation omitted).

In employment discrimination cases, where direct evidence of intentional discrimination is rare, "affidavits and depositions must be carefully scrutinized for circumstantial proof" of discrimination. *Turner v. NYU Hosps. Ctr.*, 784 F. Supp. 2d 266, 275 (S.D.N.Y. 2011). "However, even in such cases, a plaintiff must provide more than conclusory allegations of discrimination to defeat a motion for summary judgment and show more than some metaphysical doubt as to material facts." *Id.* at 275-76 (internal quotations omitted) (citing *Schwapp v. Town of Avon*, 118 F. 3d 106 (2d Cir. 1997); *Gorzynski v. Jetblue Airways Corp.*, 596 F.3d 93, 101 (2d Cir. 2010)); *Brown v. Johnson & Johnson Consumer Products Inc.*, 1994 WL 361444, at *3 n.3 (S.D.N.Y. July 11, 1994) ("To assert that [defendant's] witnesses may be lying, without any evidence to contradict the witnesses' testimony, cannot defeat a motion for summary judgment.") (citation omitted).

III. DISCRIMINATION CLAIMS

Plaintiff has raised a number of claims arising from his injury on March 14, 2020. I will first address the federal claims brought under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (the "ADA"), and then turn to the related state claims.

A. ADA

1. Discrimination claim

A motion for summary judgment with respect to a claim of discrimination under the ADA is analyzed using the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). *See Widomski v. State Univ. of N.Y. (SUNY) at Orange*, 748 F.3d 471, 476 (2d Cir. 2014). Under this framework, "the plaintiff bears the initial burden of establishing a prima facie case of discrimination. If the plaintiff does so . . . the defendant [must] articulate some legitimate, nondiscriminatory reason for its action. If such a reason is provided, plaintiff . . . may still prevail by showing . . . that the employer's determination was in fact the result of . . . discrimination." *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008) (internal quotations omitted).

To establish a prima facie case of discrimination under the ADA, a plaintiff must show (i) that his employer is subject to the statute; (ii) that he is disabled within the meaning of the statute or perceived to be so by his employer; (iii) that he was otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; and (iv) that he suffered an adverse employment action because of his disability. *See Jacques v. DiMarzio Inc.*, 386 F.3d 192, 198 (2d Cir. 2004).

A plaintiff who is able to make out a *prima facie* case creates a presumption of discrimination and shifts the burden

of production to the defendant. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000). The defendant must meet this burden by articulating a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* If the defendant can present a nondiscriminatory explanation, the presumption of discrimination drops out of the analysis and the burden of proof shifts back to the plaintiff. *Id.* at 142-43. The plaintiff must then show "that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* at 143. To defeat summary judgment, "the plaintiff's admissible evidence must show circumstances that would be sufficient to permit a rational finder of fact to infer that the defendant's employment decision was more likely than not based in whole or in part on discrimination." *Feingold v. New York*, 366 F.3d 138, 152 (2d Cir. 2004).

A reasonable jury could find that Plaintiff is disabled under the ADA. To establish a disability, a plaintiff must (1) "show that she suffers from a physical or mental impairment," (2) "identify the activity claimed to be impaired and establish that it constitutes a major life activity," and (3) "show that her impairment substantially limits the major life activity previously identified." *Weixel v. Bd. of Educ.*, 287 F.3d 138, 147 (2d Cir. 2002) (cleaned up).

An impairment need not be permanent or chronic to

qualify as a "disability" under the ADA. *Hamilton v. Westchester County*, 3 F.4th 86, 93 (2d Cir. 2021) ("[U]nder the expanded definition of 'disability' under the [2008 ADA Amendments Act], which now covers impairments lasting or expected to last less than six months, a short-term injury can qualify as an actionable disability under the ADA.") (emphasis in original) (cleaned up).

The 2008 ADA Amendments Act (ADAAA) "ma[d]e clear that the substantial-Limitation requirement in the definition of 'disability' is not an exacting one," *Hamilton*, 3 F.4th at 92 (cleaned up); *see* 29 C.F.R. § 1630.2(j)(1)(i), and "should not demand extensive analysis," 29 C.F.R. § 1630.2(j)(1)(iii); *see Brtalik v. S. Huntington Union Free Sch. Dist.*, 2012 WL 748748, at *4 (E.D.N.Y. Mar. 8, 2012).

An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

29 C.F.R. § 1630.2(j)(1)(ii); *see Parada v. Banco Indus. De Venez., C.A.*, 753 F.3d 62, 69 (2d Cir. 2014). This inquiry "usually will not require scientific, medical, or

statistical analysis," although such evidence is of course not prohibited, 29 C.F.R. § 1630.2(j)(1)(v); *Clark v. Stop & Shop Supermarket Co.*, 2016 WL 4408983, at *4 (D. Conn. Aug. 16, 2016), and is made "without regard to the ameliorative effects of mitigating measures," 42 U.S.C. § 12102(4)(E); 29 C.F.R. § 1630.2(j)(1)(vi). In determining whether an individual is disabled under the ADA, the Second Circuit has "rejected bright-line tests" and instructed courts to engage in a "fact-specific inquiry." *Parada*, 753 F.3d at 69. Appropriate considerations include "the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function." 29 C.F.R. § 1630.2(j)(4)(ii). As applicable here, the ADA provides that "major life activities include, but are not limited to ... walking, standing, and sitting." *See* 29 C.F.R. § 1630.2(i)(1)(i)-(ii); *see also Parada*, 753 F.3d at 69.

Plaintiff provided evidence that his injury substantially affected his ability to walk and stand—both major life activities. His affidavit asserts that he broke his toe in five places and that he was not able to walk at all after his injury. Affidavit of Lenny Molina, Dkt. No. 45 ("Molina. Aff."), ¶ 38. After a period in which he was unable to walk at all, he was required to use crutches for two weeks. *Id.* ¶ 39.

After that, he was required to wear a boot for six to seven months. *Id.* ¶ 40. During that time, he was not able to stand for more than ten minutes at a time, and without a boot, he was not able to put his foot on the ground at all. *Id.* ¶¶ 41–42. Because his injury resulted in a substantial impairment of his ability to walk for a substantial period of time, a reasonable jury could conclude that Plaintiff was disabled for at least some period of time following his injury. Defendants dispute the extent of Plaintiff's injury as a matter of fact—submitting an independent medical examination from a podiatrist contradicting Plaintiff's account of the seriousness and effects of his injury. Dkt. No. 40-14. But, of course, I do not weigh the evidence or make findings of fact in the context of a motion for summary judgment. The contradictory evidence presented by Defendants merely serves to highlight the existence of a disputed issue of material fact regarding plaintiff's asserted disability.

A reasonable jury could also find that the Plaintiff suffered an adverse employment action because of his disability. The Second Circuit has "defined adverse employment action broadly to include 'discharge, refusal to hire, refusal to promote, demotion, reduction in pay and reprimand.'" *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 223 (2d Cir. 2001) (quoting *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999)). Plaintiff's termination was an adverse employment

action. Dkt. No. 45, Molina Aff. ¶ 28; Dkt. No. 40, Ex. J. A reasonable jury could find that this termination was caused by his disability for two principal reasons: First, because he was the only sous chef fired. Molina Aff. ¶ 49. A reasonable jury could conclude that he was singled out for termination on account of his disability. Second, because of the timing of his termination--a mere two weeks after he submitted his second medical note asking for leave because of his injury. *Id.* ¶¶ 30-34. Defendants assert that they fired other sous chefs and Plaintiff's supervisor and that they never received the medical notes. But for purposes of the motion, I must accept Plaintiff's sworn account of events as true. Plaintiff has thus established his prima facie claim for discrimination.

Defendants have clearly articulated a legitimate, nondiscriminatory reason for terminating the plaintiff on May 18, 2020. After all, that was the outset of the COVID-19 pandemic in New York City, and Defendants assert that they furloughed, then terminated staff, on account of the pandemic. The assert that they terminated other sous chefs and that the only sous chefs that were not fired had better performance records than Plaintiff. Affidavit of Christine Metivier, Dkt. No. 40-15 ("Metivier Aff."), ¶¶ 27-28, 13, 15, 16, 27-28; affidavit of Scott Hauser, Dkt. No. 40-17 ("Hauser Aff."), ¶¶ 12, 14, 15, 20. Defendants have met their burden.

A reasonable jury could find that Defendants' reason

is pretextual and Plaintiff's termination was more likely than not based, in whole or in part, on discrimination for the same reasons that Plaintiff was able to show causation in his prima facie case. Plaintiff was the only sous chef fired on May 18, 2020, a short couple of weeks after he submitted his second medical note requesting leave. Accordingly, Defendants' summary judgment motion fails as to the plaintiff's discrimination claim under the ADA.

2. Failure to accommodate.

Summary judgment is also not warranted with respect to Plaintiff's claim for failure to accommodate under the ADA. Disability discrimination under the ADA includes a failure to provide an employee with a reasonable accommodation for his or her disability. *See Graves v. Finch Pruyn & Co.*, 457 F.3d 181, 183-84 (2d Cir. 2006). These types of claims are also analyzed using the burden-shifting scheme set forth in *McDonnell Douglas*. *McDonnell v. Schindler Elevator Corp.*, No. 12-cv-4614 (VEC), 2014 WL 3512772, at *4 (S.D.N.Y. July 16, 2014). In discrimination claims based on failures to accommodate, the plaintiff "bears the burdens of both production and persuasion as to the existence of some accommodation that would allow [him] to perform the essential functions of [his] employment." *McMillan v. City Of New York*, 711 F.3d 120, 126 (2d Cir. 2013). To establish a case of discrimination based on a failure to accommodate, a plaintiff must show by a preponderance of the

evidence that "(1) he is disabled within the meaning of [the relevant statute]; (2) his employer is a covered entity; (3) he could perform the essential functions of his job with an accommodation; and (4) the defendants refused to provide such an accommodation despite being on notice." *Fox v. Costco Wholesale Corp.*, 918 F.3d 65, 73 (2d Cir. 2019) (quoting *McBride v. BIC Consumer Prods. Mfg. Co., Inc.*, 583 F.3d 92, 96-97 (2d Cir. 2009)).

A court must conduct "a fact-specific inquiry into both the employer's description of a job and how the job is actually performed in practice." *McMillan v. City of New York*, 711 F.3d 120, 126 (2d Cir. 2013). Once the essential work functions of the position have been identified based on the employer's determination as to what functions are essential, the plaintiff must demonstrate that he could have performed these functions with an accommodation. *Id.* at 127. The burden on the plaintiff is not heavy—he must simply "suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits." *Id.* "Reasonable accommodations" may include adjustments to work schedules or other job restructuring. See 45 C.F.R. § 84.12(b) (2005). Of course, "[a] reasonable accommodation can never involve the elimination of an essential function of a job." *Shannon v. N.Y.C. Transit Auth.*, 332 F.3d 95, 100 (2d Cir. 2003). If an employee "cannot show that a reasonable accommodation existed

at the time of his [or her] dismissal," the employee cannot recover. *McElwee v. Cty. of Orange*, 700 F.3d 635, 642 (2d Cir. 2012). Once a plaintiff suggests a plausible accommodation, the burden shifts back to the defendant to demonstrate that such accommodations would present undue hardships and would therefore be unreasonable. *See McMillan*, 711 F.3d at 128. An "undue hardship" is "an action requiring significant difficulty or expense." 42 U.S.C. § 12111(10)(A).

Plaintiff has sufficiently established his disability, as described above. Defendants do not dispute that they are covered entities.

Defendants' summary of the essential work functions of Plaintiff's former position is undisputed by the plaintiff. See Hauser Aff. ¶ 11.

A reasonable jury could find that the Plaintiff could have performed the essential functions of his job with a reasonable accommodation. First, Plaintiff asserts that all he needed to do his work was to receive assistance "from other employees who were in the kitchen anyway." Molina Aff. ¶ 45. Drawing all inferences in favor of Plaintiff, I understand this to be a statement of fact that there were other employees in the kitchen and that, with their assistance, he could have performed his work as a cook. Again, I understand that Defendants assert that there were not other people in the kitchen at the time, but I am required to accept Plaintiff's

sworn facts as true for purposes of evaluating the motion. Plaintiff also asserts that despite his injury, he could have worked at a computer in an office to focus on paperwork, which he avers in his affidavit he regularly did nearly half of his shift on a day-to-day basis. Molina Aff. ¶ 44.

Defendants assert that an accommodation would have been impossible rather than reasonable because they had to terminate a majority of the crew where Plaintiff worked, and he could not have relied on other employees. Metivier Aff. ¶ 35. But again, I must accept Plaintiff's version of events—in his version of events, there were other employees in the kitchen anyway who could have helped him. He stated that he was the only sous chef terminated.

Plaintiff has also produced sufficient evidence to show that the defendants refused to provide such an accommodation, despite being on notice. An employer has sufficient notice of a disability so that they are required to engage in an interactive process to determine whether any reasonable accommodation may be made if the disability is obvious. *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 135 (2d Cir. 2008). A disability can be considered obvious when the employer knew or reasonably should have known that the employee was disabled. *Id.* Plaintiff offered evidence that Defendants were on notice of his disability because he (1) notified them by email the day after the incident on March 15, 2020; (2) an

incident form was created on the day of his injury on March 14, 2020; and (3) he provided several medical notes asking for leave due to his injury. Molina Aff. ¶¶ 23, 31-34; Dkt. No. 45, Ex. C. Plaintiff avers in his affidavit that they refused to provide the accommodation because they terminated him on May 18, 2020. Defendants dispute these facts, but, again the existence of such a disputed issue of fact requires resolution by a finder of fact. Metivier Aff. ¶ 36. Accordingly, Defendants' summary judgment motion fails as to Plaintiff's failure to accommodate claim under the ADA.

3. Retaliation.

A motion for summary judgment with respect to a retaliation claim brought under the ADA is also analyzed under the *McDonnell Douglas* burden shifting framework. *Schiano v. Quality Payroll Sys., Inc.*, 445 F.3d 597, 608 (2d Cir. 2006).

To establish a *prima facie* case of retaliation under the ADA, a plaintiff must establish that (1) the employee was engaged in an activity protected by the ADA, (2) the employer was aware of that activity, (3) an employment action adverse to the plaintiff occurred, and (4) there existed a causal connection between the protected activity and the adverse employment action. *Id.* "A causal connection in retaliation claims can be shown either '(1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence, such as

disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by the defendant.'" *Littlejohn v. City of New York*, 795 F.3d 297, 319 (2d Cir. 2015) (quoting *Gordon v. N.Y.C. Bd. of Educ.*, 232 F.3d 111, 117 (2d Cir. 2000)). If the plaintiff sustains his initial burden of demonstrating a prima facie case, "a presumption of retaliation arises." *Hicks v. Baines*, 593 F.3d 159, 164 (2d Cir. 2010) (quoting *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 173 (2d Cir. 2005)). "If a plaintiff sustains the initial burden, a presumption of retaliation arises." *Jute*, 420 F.3d at 173. At the second step of the *McDonnell Douglas* analysis, the burden then shifts to the defendant to rebut the presumption of retaliation "by 'articulat[ing] a legitimate, non-retaliatory reason for the adverse employment action.'" *Ya-Chen Chen v. City Univ. of New York*, 805 F.3d 59, 70 (2d Cir. 2015). "If the defendant provides such an explanation, 'the presumption of retaliation dissipates.'" *Id.* (quoting Jute, 420 F.3d at 173).

At the third and final step of the analysis, "[t]he plaintiff must . . . come forward with [proof that the] non-retaliatory reason is a mere pretext for retaliation." *Misas v. N. Shore-Long Island Jewish Health Sys.*, 2017 WL 1535112, at *9 (S.D.N.Y. Apr. 27, 2017) (internal quotation omitted). To satisfy this burden, "the plaintiff must prove 'that the desire to retaliate was the but-for cause of the

challenged employment action,'" *Ya-Chen Chen*, 805 F.3d at 70 (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013)), and "not simply a 'substantial' or 'motivating' factor in the employer's decision." *Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 845 (2d Cir. 2013) (citing *Nassar*, 133 S. Ct. at 2526, 2533). Nevertheless, as the Second Circuit has explained, "[t]he determination of whether retaliation was a 'but-for' cause, rather than just a motivating factor, is particularly poorly suited to disposition by summary judgment, because it requires weighing of the disputed facts, rather than a determination that there is no genuine dispute as to any material fact." *Id.* at 846.

Plaintiff has established his prima facie case of retaliation. Under the ADA, "[r]equests for disability accommodation and complaints, whether formal or informal, about working conditions related to one's alleged disability are protected activities." *Limauro v. Consol Edison Co. of New York, Inc.*, 2021 WL 466952, at *10 (S.D.N.Y. Feb. 9, 2021). Plaintiff has presented sufficient evidence that he engaged in a protected activity and that Defendants knew of this protected activity. Plaintiff avers that he submitted requests for accommodation to Defendants through medical notes. Molina Aff. at ¶¶ 23, 31-34. As I discussed before, Plaintiff suffered an adverse employment action because he was terminated. Molina Aff. ¶ 28. Plaintiff also established a causal relationship

between the protected activity and the termination because of the temporal relationship between the two. A temporal relationship between the protected activity and the adverse action suffices to establish a prima facie claim of retaliation, even when the activity and action are as much as five months apart. *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 110 (2d Cir. 2010) (noting that, though a "bright line defining, for the purposes of a prima facie case, the outer limits beyond which a temporal relationship is too attenuated to establish causation, we have previously held that five months is not too long to find the causal relationship."). Plaintiff was terminated only two weeks after his request for an accommodation.

As I have already described, Defendants have articulated a legitimate, nonretaliatory reason for the adverse employment action—the onset of the global COVID-19 pandemic combined with what they assert to be Plaintiff's poor performance. Metivier Aff. ¶¶ 27-28, 13, 15, 16; Hauser Aff. ¶¶ 12, 14, 15, 20.

Plaintiff has presented sufficient evidence to support the conclusion that Defendants' explanation is mere pretext. As I described before, the adverse employment action followed close on the heels of his request. "The temporal proximity of events may give rise to an inference of retaliation for the purposes of establishing a prima facie case of retaliation . .

Without more, such temporal proximity is insufficient to satisfy [a plaintiff's] burden to bring forward some evidence of pretext." *Clark v. Jewish Childcare Ass'n, Inc.*, 96 F. Supp. 3d 237 262-63 (S.D.N.Y. 2015) (quoting *El Sayed v. Hilton Hotels Corp.*, 627 F.3d 931, 933 (2d Cir. 2010)). But here, Plaintiff has presented evidence of more than temporal proximity. Plaintiff has shown that he was treated differently than the other employees because he was the only sous chef fired. Molina Aff. ¶¶ 30-34. Again, I must accept Plaintiff's evidence as true for this purpose. That differential treatment, together with the temporal connection, suffice to defeat Defendants' motion for summary judgment.

B. NYSHRL and the NYCRHL state claims

Claims brought under the NYCHRL must be reviewed "independently from and 'more liberally' than their federal and state counterparts." *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 278 (2d Cir. 2009) (quoting *Williams v. N.Y. City Hous. Auth.*, 872 N.Y.S.2d 27, 31 (1st Dep't 2009)).

The NYCHRL is a "one-way ratchet," by which interpretations of state and federal civil rights statutes can serve only "'as a floor below which the City's Human Rights law cannot fall.'" *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 109 (2d Cir. 2013). Because the Court ruled that Defendants are not entitled to summary judgment under the more stringent standards applicable to the ADA,

summary judgment is not warranted with respect to the more liberal standard under the NYCHRL for the discrimination, failure to accommodate, and retaliation claims.

The same result applies to Plaintiff's claims under the New York State Human Rights Law (the "NYSHRL"). The New York state legislature amended the NYSHRL on August 12, 2019, to "establish that its provisions should be construed liberally even if federal civil rights law, including those laws with provisions worded comparably to the provisions of this article, have been construed narrowly. The effect of that amendment is to render the standard for claims closer to the [more liberal] standard under the NYCHRL." *Talbott-Serrano v. Iona Coll.*, 2022 WL 3718346, at *8 (S.D.N.Y. Aug. 29, 2022). "[T]hese amendments only apply to claims that accrue on or after the effective date of October 11, 2019." *Id.* "[A] cause of action for discrimination under the NYSHRL accrues and the limitation period begins to run on the date of the alleged discriminatory act." *Fair Hous. Just. Ctr., Inc. v. JDS Dev. LLC*, 443 F. Supp. 3d 494, 504 (S.D.N.Y. 2020), *reconsideration denied*, 2020 WL 5018349 (S.D.N.Y. Aug. 25, 2020) (citing *Flaherty v. Massapequa Pub. Sch.*, 752 F. Supp. 2d 286, 293 (E.D.N.Y. 2010)) (alterations omitted). As such, the amendments apply to Plaintiff's claims as the alleged discriminatory acts occurred months after October 19, 2019. Because the more liberal standard applicable to the NYCHRL apples to the NYSHRL as well,

summary judgment is not warranted with respect to Plaintiff's claims arising under that statute.

IV. MOTION TO EXCLUDE EXPERT TESTIMONY.

Defendant's motion to exclude any expert testimony on behalf of Plaintiff is granted. On March 31, 2021, the Court entered a case management plan and scheduling order in this case. Dkt. No. 25. The order contained deadlines for the completion of discovery in this case. Among other things, the order established a deadline for production of Plaintiff's expert disclosures: The deadline was July 30, 2021. The order also established a deadline for the completion of expert discovery: September 29, 2021. The Court discussed those deadlines and their import at length during the initial pretrial conference, and reminded the parties of those comments in an order issued by the Court on July 24, 2021. Dkt. No. 28. In an August 9, 2021 letter to the Court, Plaintiff's counsel wrote that "Plaintiff determined that he does not wish to offer expert testimony." Dkt. No. 31. Consistent with that assertion, I understand that Plaintiff has never disclosed an expert in this case.

Rule 26 provides that at the start of the case, parties must disclose "the name and, if known, the address and telephone number of each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or

defenses, unless the use would be solely for impeachment[.]" Fed. R. Civ. P. 26(a)(1)(A)(i). These disclosures must be supplemented as new information comes to light. *See* Fed. R. Civ. P. 26(e)(1). The rules also require disclosure of expert witnesses. *See* Fed. R. Civ. P. 26(a)(2). If a party does not identify a witness in the initial disclosures or otherwise, that party is "not allowed to use that . . . witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

"If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence . . . at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c).

While the language of Rule 37 provides for automatic exclusion of expert testimony that falls outside the scope of a Rule 26(a) disclosure and report, the Second Circuit requires district courts to consider four factors prior to the exclusion of such evidence: "(1) the party's explanation for the failure to comply with the [disclosure requirement]; (2) the importance of the testimony of the precluded witness; (3) the prejudice suffered by the opposing party as a result of having to prepare to meet the new testimony; and (4) the possibility of a continuance." *Design Strategy, Inc., v. Davis*, 469 F.3d 284,

296 (2d Cir. 2006) (Citing *Patterson v. Balsamico*, 440 F.3d 104, 117 (2d Cir. 2006)).

The first factor weighs heavily in favor of preclusion. Plaintiff intentionally chose not to present expert disclosures in this case.

The second factor is neutral. Plaintiff has made a determination that he does not wish to use expert testimony in this case. Based on that appraisal, the Court does not understand the evidence to be of significance. While expert testimony can be helpful in a disability case, as I have outlined, it is not necessary.

The third factor weighs heavily in favor of preclusion. Because Plaintiff did not disclose an expert, Defendant will not have the opportunity to depose any expert later revealed by him.

Finally, the fourth factor weighs in favor of preclusion. As I explained earlier, this case will have been pending for a substantial amount of time by the time that the case is tried. The circuit has warned that "a court must not let its zeal for a tidy calendar overcome its duty to do justice." *Winston v. Prudential Lines, Inc.*, 415 F.2d 619, 621 (2d Cir. 1969) (quotation omitted). Though the disclosures were due over a year ago, Plaintiff has never asked for a continuance. *See Balsamico*, 440 F.3d at 118.

Furthermore, "[t]o permit entirely unexplained Rule 26

violations to go unsanctioned whenever the evidence at issue is sufficiently important would give parties the perverse incentive to spring especially large and surprising disclosures on their adversaries on the eve of trial—an extreme version of the 'sandbagging' that Rule 26 attempts to avoid." *Agence France Presse v. Morel*, 293 F.R.D. 682, 687 (S.D.N.Y. 2013).

Weighing the *Design Strategies* factors, the Court finds that exclusion of expert testimony is warranted here to the extent that Plaintiff were to seek to introduce the testimony of an expert at this stage of the case or a later stage of the case. Defendants' request to exclude Plaintiff's expert testimony or evidence is granted.

V. CONCLUSION AND NEXT STEPS

For the foregoing reasons, Defendants' motion for summary judgment is denied in its entirety. I am granting Defendants' motion with respect to the exclusion of any unnoticed expert testimony. I will issue a short summary order later today or tomorrow pointing to the transcript of today's proceeding for the basis for my decision.

Just a brief note. As you have heard, much of my decision here rests on the fact that I'm required to credit plaintiff's statements in his affidavit as true. He stated, under penalty of perjury, that no other sous chefs were terminated. He states that other people in the kitchen were there anyway to help. Those are both assertions made by

plaintiff under penalty of perjury in the affidavit presented to me. I understand that there is a question of fact about whether or not those statements are true, but I have to credit plaintiff's assertions for purposes of evaluating the motion for summary judgment. If, of course, it turns out that they are not true and plaintiff perjured himself, that's a different problem. But for purposes of the summary judgment motion practice, I accept his assertions as true.

Let's talk a little bit about next steps. I am going to schedule a trial date. I am going to do that relatively promptly. I don't know what the parties' expectations are. I'd like to give you some time to talk about the possibility of settling this case. I am not going to put my finger on the scale about what I think about the merits of the case. But I would certainly be happy to refer you to the mediation office or to our magistrate judge so that you can get some kind of an independent assessment of the value of this case involving a broken toe and the termination of somebody in the hospitality industry on the eve of COVID.

I will try to schedule trial in a way that gives you time to do that work, if you'd like to do that. Let me begin with that. Then I am going to spend a little bit of time with you talking about the pretrial submissions that my order scheduling trial are going to require that the parties provide to me.

First, counsel for plaintiff, would it be helpful, in your view, for me to refer the parties to mediation, either before the magistrate judge or otherwise?

MR. SHALOM: Your Honor, plaintiff would be open to proposed mediation to see if the parties can amicably resolve. If not, plaintiff would be ready, willing, and able to continue with trial.

THE COURT: Thank you.

I am going to refer the parties to mediation. I'll put a little bit of extra time into the schedule so that you can focus on that, and I'll call it the next couple of months. I will set a schedule for trial that will give you some, I'll call it, runway to talk about resolution. I encourage you to talk about it.

Let me spend a little bit of time talking about what my order will provide. My order will establish a trial date. My understanding is that the parties anticipate that this is a trial that will last about three days. I think that's probably about right, based on what I know about the case. I am going to pick a week when I have a full week that I can give you. I don't expect, given the nature of the case, that it will take longer than that to try.

I am going to include in my order directions regarding the pretrial submissions. Principally, I am going to pointing you to my individual rules of practice in civil cases,

particularly Rule 5. They are pretty self-explanatory, but I just want to take a few more moments of your time to elaborate on a couple of things about those rules.

The first thing that I want to highlight is just that it requires a substantial amount of advance work to put together the pretrial materials that will be due on a date certain in accordance with my order. So I am going to be ordering that you provide to me those pretrial submissions. Implicit in that is an order that the parties do the joint work prior to the date so that you can meet that deadline. Let me give you just one brief example of the kind of things that require substantial advance work. Not that this is unknown to you, but let me just make sure that you have at least heard one illustration.

The joint pretrial order requires that the parties provide the Court with a bunch of information. Among that is a list of all of the exhibits that each side will use at trial. That is to be presented to me in a chart. The first column has the exhibit letter or number that will refer to the document or other evidence at trial. The second column describes that exhibit. The third column will state whether or not there is an objection to the introduction of the exhibit. The fourth column will describe the basis for the objection.

So you can see, just to put together that part of the joint pretrial order, the parties are going to need to figure

out what exhibits you want to use, you are going to need to share them with one another, and you will need to do that sufficiently in advance of the deadline so that the other side can tell you what any objections might be so you can include that information in the chart.

Similarly, in the joint pretrial order, you will need to identify any deposition designations, and that means that you must identify the deposition designations by line, page and line. You will need to share them with your adversary so that they can object to any designations and also present any counterdesignations and so that a responsive objection to the counterdesignations can be included in the joint pretrial order.

Just to put it very simply, to provide the Court with the information that must be included in the joint pretrial order, the parties need to do a lot of advance work. That advance work is necessarily collaborative, and I'm directing that you do that work so you can meet the deadline.

The second thing that I want to just elaborate on is that my individual rules of practice require the presentation of a joint charge and a joint voir dire set of questions. I want to just make it very clear that I'm not requiring that the parties agree on everything. That would be inappropriate. I'm not asking you for you to agree on everything when I ask you to provide me with a joint charge.

Instead, what I am doing is I'm asking you to provide me with a single document that contains all of the parties' proposed charges. If there are objections to or proposed alternative language with respect to an aspect of the charge, I ask that you include it in the same document with as much specificity as possible.

To the extent that there is an objection or an alternative formulation of language, again, it should be presented with as much specificity as possible and it should be supported by reference to relevant precedent or secondary sources.

The reason why I'm doing this is because, as you know, frequently parties will provide two complete dueling sets of charges, which will be different but which will have very few substantive differences, and to find the substantive differences the parties and the Court have to pick through each of the proposed charges.

Rather than doing that, I'm asking that the parties work together and identify those areas with specificity where you have substantive disagreements and present those substantive disagreements in a way that will make it most efficient for the Court and the parties to focus on and resolve them. That may mean that you'll present alternative formulations of language in, for example, strikeout in a blacklined version, or you may include a footnote noting the

language that is problematic.

Understand that I'll be evaluating the language that's presented based on the merits of the language, not based on where it's presented in the document. So if your proposal is in a footnote rather than in a mainline text, don't be concerned that I will discredit it or undervalue it merely because of its placement in that jointly submitted document.

The same is true for the joint voir dire requests. I do not deal with duplicate submissions. Rather than having each party give me a series of questions, many of which substantially overlap, I am asking you to prepare a joint set of voir dire questions. Again, if one of you thinks that the question proposed by your adversary is inappropriate in any way, you should just note that in a footnote, and that will make it easier for all of us to evaluate the requests and see where there are real disputes.

That's all I have. I will find a trial date for us shortly. I think that, thankfully, where we are in the pandemic now, I hope that I'll be able to give you a firm, fixed trial date. It won't be in the near term. It will probably be sometime in spring of 2023, is my guess, looking at the calendar now. Your pretrial submissions will be due substantially before that, though, so that I can resolve them at the pretrial conference.

As I said, I'll refer you to the magistrate judge for

settlement conference, and I will provide about two months between now and the time I think that you need to start working on your pretrial submissions to allow you to focus on settlement rather than trial.

That's it. Anything else that we need to talk about here before we adjourn? Again, I apologize for starting so late. I thank you for your flexibility.

Counsel for plaintiff, anything else from you?

MR. SHALOM: No, your Honor.

THE COURT: Thank you.

Counsel for defendant.

MR. DEMPSEY: No, your Honor.

THE COURT: Thank you all. This proceeding is adjourned.

(Adjourned)